UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

A CAB, LLC[1]

Employer

and **Case 28-RC-6172**

LAS VEGAS PROFESSIONAL DRIVERS UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Las Vegas Professional Drivers Union (Petitioner) seeks an election within a unit comprised of approximately 54 full-time and regular part-time drivers employed by A Cab, LLC (Employer) working out of its facility located at 5581 South Cameron, Las Vegas, Nevada. Based on the hearing which has been conducted concerning the Petitioner's petition, there are two issues presented for determination. First, the Employer contends, contrary to the Petitioner, that the Petitioner is not a labor organization as defined by Section 2(5) of the Act and, on this basis, the petition should be dismissed. Second, the Petitioner seeks to exclude from the unit the Employer's three road supervisors, whom the Petitioner contends are statutory supervisors. Contrary to the Petitioner, the Employer maintains that road supervisors are employees who should be included in the unit, should an election be directed. For the reasons more fully discussed below, I conclude that the Petitioner is an organization in which employees participate and which exists for the purpose of representing the Employer's employees. In these circumstances I conclude that the Petitioner is a labor organization as defined in Section 2(5) of the Act. In addition, I conclude that the road supervisors have authority to discipline employees and grant them time off. On this basis, I find that they are statutory supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit found appropriate herein.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures**: The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

[1] The name of the Employer appears as corrected at the hearing.

2. **Jurisdiction:** The Employer, A Cab, LLC, a limited liability company, incorporated under the laws of the State of Nevada, is engaged in the business of providing taxi cab and transportation services in Clark County, Nevada, out of its principal place of business located at 5581 South Cameron, Las Vegas, Nevada. The parties have stipulated, and I find, that during the 12-month period ending April 30, 2003, the Employer, in conducting its business has received gross revenues in excess of $500,000 and has purchased and received goods and materials at its Las Vegas facility valued in excess of $5,000 directly from points located outside the State of Nevada. In these circumstances, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation and Labor Organization Status**: The Petitioner claims to represent the taxicab drivers employed by the Employer. As noted above, the Employer maintains that the Petitioner is not a labor organization. With respect to labor organization status, David H. Sanders, a driver currently employed by the Employer, testified that he and other employees in February or March 2003, began talking to their fellow employees about organizing a union at the Employer. Sanders and fellow driver, Alan Broze, as well as two other cab drivers constitute the Petitioner's organizing committee. The purpose of their organization is to deal with the Employer regarding wages, hours, and other terms and conditions of employment. As of the date of the hearing, the Petitioner had not held any general membership meetings although it had held a number of meetings of the organizing committee. Through an exchange of e-mail and personal meetings, Sanders and the other three organizing committee employees have drafted a constitution, bylaws, and signature cards. The Petitioner has distributed the signature cards to drivers, seeking to authorize the Petitioner to represent them. Employees have participated with Petitioner by discussing work-related issues among themselves and by the distribution of the signature cards. As of the hearing date, the Petitioner's constitution and bylaws had not been ratified but it was anticipated that they would be, along with a $1 per working day dues check-off provision to be implemented at a later date. The Petitioner also plans to have general membership meetings and the election of officers at a future date. Some time in early April 2003, Sanders informed the Employer's General Manager, Deanna Reach, that he was organizing a union at the Employer so that employee issues could be addressed.

Section 2(5) of the Act provides the following definition of "labor organization":

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of "labor organization" has long been interpreted broadly. See, *Electromation, Inc.*, 309 NLRB 990, 993-94 (1992), enf'd. 35 F.3d 1148 (7th Cir. 1994). To fall within the definition of a "labor organization," the Board has held that employees must participate in the labor organization and it must exist for the purpose of dealing with employers. *Alto Plastic Mfg. Corp.*, 136 NLRB 850, 851-852 (1962). Under this definition, an incipient union which has not yet actually represented employees may, nevertheless, be accorded Section 2(5) status if it was formed for the purpose of representing employees. *Butler Manufacturing*

Company, 167 NLRB 308 (1967); *The East Dayton Tool & Die Company*, 194 NLRB 266 (1971). Moreover, "structural formalities are not prerequisites to labor organization status." *Yale New Haven Hospital*, 309 NLRB 363 (1992) (no constitution, by-laws, meetings, or filings with the Department of Labor); *Butler*, supra, at 308 (no constitution, bylaws, dues or initiation fees); *East Dayton*, supra, at 266 (no constitution or officers). It is well settled that the existence of elected officers, a constitution, or bylaws is not determinative in analyzing whether an association of employees is a labor organization within the meaning of the Act. *Yale New Haven Hospital*, supra. Nor is labor organization status based on proof of specific instances that the organization has dealt with an employer. *Armco, Inc*., 271 NLRB 350 (1984); *Steiner-Liff Textile Products Co.*, 259 NLRB 1064, 1065 (1982). Rather, the *intent* of the organization and not what activities the organization has actually performed is critical in ascertaining labor organization status, regardless of the progress of the organization's development. *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980). Even if such a labor organization becomes inactive without ever having represented employees, it is deemed to have been a statutory labor organization if its organizational attempts "[c]learly…envisage participation by employees," and if it existed "for the statutory purposes although they never came to fruition." *Comet Rice Mills*, 195 NLRB 671, 674 (1972).

Based on the evidence presented at the hearing, I find that the Petitioner is a labor organization within the meaning of the Act. Although, as of the hearing date, the Petitioner lacked some of the formal trappings of a labor organization, it is well established that such structural formalities are not prerequisites to labor organization status within the broad meaning of Section 2(5) of the Act. Rather, the fact that several employees of the Employer have formed an organization to meet and deal with the Employer with respect to matters of wages, hours and working conditions, is sufficient for finding Petitioner to be a labor organization.

The Employer argues in its brief that the Petitioner is a "one-man show" and cites *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262 (4th Cir. 1994), and *NLRB v. Associated Machines*, 219 F.2d 433 (6th Cir. 1955), for the proposition that an organization focused on individual versus collective complaints is not a bona fide labor organization as defined by Section 2(5) of the Act. Both of these cases involve circumstances not present herein. Rather, the cases concern circumstances where individual employees sought to address personal complaints, rather than collective complaints, with an employer. In this proceeding, Sanders testified without contradiction that other employees participate in the Petitioner, that Petitioner exists for the purpose of obtaining recognition from the Employer as a labor organization and bargaining with the Employer with respect to the terms and conditions of the driver employees.

The Employer also relies on *Electromation*, supra, and asserts that the Petitioner cannot be found to be a bona fide labor organization as it has not yet submitted any bargaining proposals to the Employer. The Employer's reliance on *Electromation* is misplaced. As mentioned above, a group of employees need not engage in actual bargaining with an employer in order to be found to be a labor organization. *Armco*, supra. Rather, if an organization simply exists for the purpose of dealing with employers in the future, a bona fide labor organization will be found, even in the absence of actual bargaining. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210-214 (1959).

In sum, I find that the record amply demonstrates that the Petitioner is a newly-formed organization in which employees participate and which exists for the purpose of representing the Employer's employees. The Petitioner's intended purpose is to negotiate with the Employer over wages, hours, and other terms and conditions of employment. In these circumstances, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. **Statutory Question**: A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding**: The second issue presented for my determination is whether the three road supervisors should be excluded from the unit based upon their supervisory status. No other classification is in dispute. I shall examine the Employer's operations and the role road supervisors play, survey the case law surrounding the supervisory issue, and set forth the basis for my conclusion that road supervisors are statutory supervisors within the meaning of the Act. There is no history of collective bargaining involving the employees in the petitioned-for unit.

A. The Employer's Operation

The Employer has been engaged in providing taxicab and related services in the Las Vegas area since approximately November 2001. The Employer, a small taxicab company bases its Las Vegas operations at one central location, and is restricted by the Taxi Cab Authority in the geographical area that it can service. These restrictions include not being able to pick up fares east of Interstate 15 which runs through Las Vegas. Deanna Reach, the General Manager, oversees the Employer's day-to-day operations and reports directly to the Employer's owner, C.J. Nady. Below Reach are three road supervisors, Robert McCollough, Robert Hopkins, and Nils Schanke, as well as dispatchers, and a secretary. The dispatchers assign calls to the drivers. The record reveals that there are a total of approximately 57 drivers including the 3 road supervisors who operate the Employer's cabs. Taxi drivers operate these vehicles on various 12-hour four-day shifts with the Employer. There are 16 drivers per shift.

The record reveals that the road supervisors' duties include investigating accidents; serving as a representative for the Employer at accident scenes; changing tires; checking the safety of drivers; relieving dispatchers; answering employee questions; monitoring the radio; assuming the responsibilities of General Manager Reach when she is away from the facility; and making "sure everything ran smooth." The Employer has posted a sign in the dispatch area with the names and telephone numbers of the road supervisors to facilitate employee contact with them. The Employer has also affixed on the taxicabs driven by road supervisors a magnetic sign with the word "Supervisor." Road supervisors earn approximately $20 per shift more than other drivers of the Employer's cabs. With respect to the road supervisors' role in disciplining drivers, the testimonial evidence was somewhat in conflict. Sanders, a driver currently employed by the Employer, testified that Road Supervisor McCollough called him into the dispatch office and verbally reprimanded him for statements he made on the radio. Sanders also testified that Reach informed him that all supervisors can terminate employees. Alan Broze, a former road supervisor and current driver for the Employer, testified that Reach informed him that he was to go to accidents, make sure things ran smoothly, and fire employees, if necessary. Broze testified that he suspended a driver and a dispatcher after he conducted an independent investigation,

terminated two other drivers, issued a verbal warning to another driver, and issued a written warning to yet another employee. Broze testified that only one of these disciplinary actions involved prior approval or input from Reach. Broze also testified that without prior approval from Reach he had permitted employees to leave work. Contrary to Sanders and Broze, Reach testified that road supervisors had no authority to allow employees to leave work early, terminate employees, or otherwise discipline employees without her prior approval. Reach testified, however, that a road supervisor could terminate a driver who picked up a fare east of I-15, because that driver would be in violation of a state law that restricts where the Employer may conduct business. Reach testified that she followed the recommendations of the road supervisors two-thirds of the time that they made recommendations to her concerning discipline or other employee issues.

B. Legal Analysis and Determination

Section 2(11) of the Act defines the term "supervisor" as:

> ...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994), the Supreme Court held that the appropriate test for determining supervisory status for employees is: a) whether the employee has the authority to engage in any of the above criteria; b) whether the employee uses independent judgment in the exercise of such authority; and c) whether the employee holds the authority in the interest of the employer. More recently, in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. However, while the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB No. 54 (2001). The supervisory definition is phrased in the disjunctive, and possession of any one of the foregoing types of authority is sufficient to make the individual a supervisor. *Nymed Inc. d/b/a Ten Broeck Commons*, 320 NLRB 806, 809 (1996). The individual need only "possess" the authority and there is no requirement that the individual actually exercise it. *Jasta Manufacturing Company Inc.*, 246 NLRB 48, 61 (1979) enf'd 634 F.2d 623 (4th Cir. 1980).

The Board and the courts have held that it is the burden of the party making the assertion of supervisory status to prove that such status exists. *Ohio Masonic Home*, 295 NLRB 486, 490 (1989); *Kentucky River*, supra. Here, the burden is on the Petitioner. That burden must be met

by "a preponderance of the credible evidence." *Star Trek, The Experience*, 334 NLRB No. 29 (2001).

In applying these principles to the road supervisors, I conclude that the Petitioner has met its burden of establishing that these individuals are supervisors within the meaning of Section 2(11) of the Act. I base my conclusion on several factors. First, I rely primarily on the fact that road supervisors either have the authority to issue discipline or permit employees to leave work early, or effectively to recommend such actions. *Health Care & Retirement Corp*., supra (finding nurses supervisors where they "regularly issued warnings and had discretion to determine when and why to issue warnings" under the employer's discipline system); *Venture Industries, Inc*., 327 NLRB 918, 919-20 (1999) (finding supervisory status where the employee issued oral and written warnings, recommended suspension of subordinates to management, and where management followed recommendations 75% of the time).

Second, I rely on the fact that road supervisors drive cabs with signs which designate them as "supervisor;" have their names and telephone numbers listed in the dispatch areas so that employees may contact them with questions; are responsible for answering all employee questions; substitute for the general manager in her absence; and act as the Employer's representative at accident scenes.

Third, I base my conclusion on the presence of certain other indicia of supervisory authority that militates in favor of finding that road supervisors are statutory supervisors. As the Board has explained, nonstatutory indications of supervisory status, or "secondary indicia," such as higher pay, or supervisor to non-supervisor ratios, may bolster evidence demonstrating that employees otherwise exercise one of the powers listed in the statute. *Marian Manor for the Aged and Infirm*, 333 NLRB No. 133, (2001); cf. *Ken-Crest Services*, 335 NLRB No. 63 (2001). Road supervisors are paid up to $20 per day more than drivers, even though, aside from their supervisory duties, they perform the same work as drivers. The additional remuneration does not reward superior skill or training; rather, the road supervisors receive extra pay to perform supervisory duties. In such a case, supervisory status is likely. See *Essbar Equipment Co.*, 315 NLRB 461, 461 (1994) (noting that an individual's higher pay of $5 extra per hour than subordinates supports the conclusion that he also exercised primary indicia of supervisory authority). Additionally, if the road supervisors are found to be employees, a single supervisor, General Manager Reach, would be required to manage and supervise a cadre of 57 drivers. Such an unwieldy supervisor-to-employee ratio militates against including the road supervisors in a unit with the employees they oversee. *Pennsylvania Truck Lines*, 199 NLRB 641, 642 (1972).

The Employer argues that road supervisors do not exercise independent judgment in carrying out their duties. The record before me, however, as recited in more detail above, establishes that road supervisors have effectively recommended and taken numerous discretionary actions affecting drivers. See *George C. Foss Co*., 270 NLRB 232, 234 (1984) (possession of any one indicia of supervisory status is sufficient to establish an individual as a statutory supervisor).

In sum, I find that the road supervisors possess the necessary indicia of supervisory status, as set forth in Section 2(11) of the Act, and I shall exclude them from the unit found appropriate herein. Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **INCLUDED**: All full-time and regular part-time drivers employed by the Employer out of its facility located at 5581 South Cameron, Las Vegas, Nevada.
>
> **EXCLUDED**: All other employees, road supervisors, office clericals, dispatchers, guards, and supervisors as defined in the Act.

There are approximately 54 employees in the unit found appropriate.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

LAS VEGAS PROFESSIONAL DRIVERS UNION

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters. The undersigned will make this list available

to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Region 28 Resident Office, 600 Las Vegas Boulevard South, Suite 400, Las Vegas, Nevada 89101, on or before **May 23, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by **May 30, 2003**. A copy of the request for review should also be served on the undersigned.

DATED at Phoenix, Arizona, this 16th day of May 2003.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board - Region 28

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